
The Scope of Chabra Freezing Injunctions against Third Parties: a Time for a More Cautious Approach?

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There has been a noticeable rise in the frequency of the so called Chabra injunction cases in the English courts where claimants are seeking to restrain third parties, against whom there is no cause of action, from dealing with their assets. By taking lessons from the historical and theoretical foundations of this unusual form of relief, this article will examine potential concerns about the evidential thresholds that a claimant is required to cross. Instead of limiting the analysis to domestic Chabra injunction cases with no foreign element, the article will also deal with the complex and controversial issues of jurisdiction arising as a matter of English private international law in cross-border commercial litigation and arbitration. The article will make some reform proposals in accordance with two broad objectives: creating a more equitable distribution of freedom between claimants and third parties, and ensuring that the English courts respect the territorial jurisdiction of the foreign courts.

1. Introduction

In the early 1990s, the English courts felt the need to respond to unscrupulous defendants who took advantage of further advances in technology and were increasingly creative in avoiding enforcement by using third parties to conceal their assets. The response of the courts was to create an extension to the scope of freezing injunctions so as to enable claimants to restrain third parties from dissipating assets that may be amenable to enforcement. This article will consider the landmark case, *TSB Bank International v Chabra*,[2] in which such an extension was developed and how its own scope has been gradually expanding due to the apparent need to keep up with the latest methods of judgment evasion. The extension in *Chabra* was not the first time that the English courts decided to expand the scope of the non-proprietary form of equitable relief first developed in *Karageorgis*[3] and initially named after the second case*, The Mareva.*[4] Nevertheless, it was arguably one of the most significant judicial extensions because it represented the creation of a new category of relief directed against innocent third parties who suddenly found themselves pulled into interlocutory proceedings, even though they were not a party to the substantive proceedings between the claimant and the defendant.

The primary objective of this article will be to determine whether the existing boundaries of *Chabra* injunctions are consistent with the principles which underpin the power of the English courts to grant freezing injunctions. In order to obtain a complete picture, it will be important to examine not only

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[2] [1992] 1 WLR 231.

[3] *Nippon Yusen Kaisha v Karageorgis* [1975] 1 W.L.R. 1093.

[4] *Mareva Compania Naviera S.A. v. International Bulkcarriers Ltd. (The Mareva)* [1975] 2 Lloyd's Rep 509.

the substantive scope of *Chabra* injunctions but also the international (or territorial) scope of this category of relief.[5] With regards to their substantive scope, sufficient account has to be taken of any wider but related developments in English civil procedure. One example is the 'clarification' or 'reformulation' of the good arguable case test. With regards to the international scope of *Chabra* injunctions, it is noted at this stage that there are a number of unanswered questions arising from the inconsistent decisions of the English courts. The most recent example is the issue of whether *Chabra* injunctions are available against third parties who are outside the territorial jurisdiction of the English courts in support of arbitration proceedings. This article will propose a possible solution in an attempt to eliminate the uncertainty on this issue and any other grey areas in the scope of *Chabra* injunctions.

2. The key principles of freezing injunctions

It is important to recall that a pre-judgment freezing injunction represents an exception to the general rule of non-interference with the assets of the defendant before judgment.[6] The scope of the exception to the general rule should be treated as a sensitive issue. Any unnecessary, unjustifiable, and unprincipled extension of the exception has the potential to undermine the general rule. The main purpose of a pre-judgment freezing injunction is to prevent a defendant from making himself judgment proof and rendering any litigation futile.[7] As Gloster J (as she then was) observed in *The Mahakam*, "The purpose of a freezing order is so that the court "can ensure the effective enforcement of its orders". To this end the aim is to ensure that there is a fund to meet any judgment".[8] Several principles can be identified as providing the foundations of a freezing injunction.[9] First, as an equitable form of relief, the legal power to grant a freezing injunction can only be activated by injustice, whether actual or potential.[10] Second, a freezing injunction is not simply a weapon designed to assist claimants in their fight against unscrupulous defendants. Instead, a freezing injunction has a much broader function of ensuring equipage equality.[11] It seeks to create a level-playing field in litigation and this objective would not be possible to achieve if the courts were to focus entirely on assisting claimants. Third, a freezing injunction does not operate as an attachment and its purpose is not to provide security to the claimant.[12] Nevertheless, such an injunction is a quasi-proprietary form of relief.[13] Fourth, a freezing injunction should not interfere with the rights and obligations of innocent third parties who have an interest in the defendant's assets.[14] Each of the four principles has important

[5] The term 'substantive scope' will be used to refer to the substantive circumstances in which a freezing injunction is available, such as its availability in respect of non-proprietary claims. The term 'international scope' will be used to refer to the availability of a freezing injunction in cases involving one or more foreign elements (e.g. to restrain a foreign defendant from dissipating any foreign assets).

[6] *Lister & Co v Stubbs* (1890) 45 Ch.D. 1; *Mercedes-Benz v Leiduck* [1996] A.C. 284, 301. See, generally, S. Gee, *Commercial Injunctions* (6th edition, Sweet and Maxwell, 2016).

[7] *Fourie v Le Roux and others* [2007] UKHL 1, [2].

[8] *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm), [38].

[9] It should be noted that this is not an exhaustive list of principles.

[10] R. Fentiman, *International Commercial Litigation* (2nd edition, OUP, 2015), 17.22.

[11] F. Saranovic, 'Rethinking the Scope of Freezing Injunctions' (2018) CJQ 383.

[12] *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 W.L.R. 966. See, on the *in personam* operation of injunctive relief in general, JM Paterson, *Kerr on Injunctions* (6th edn, Sweet and Maxwell, 1927)

[13] F. Saranovic, 'Jurisdiction and Freezing Injunctions: a Reassessment' (2019) 68 ICLQ 639, 655-658. See also, N. Browne-Wilkinson, 'Territorial Jurisdiction and the New Technologies' (1991) 25 Israel L Rev 145; J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity (1981) 75(4) AJIL 820.

[14] *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894, 897; *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539, 542; *Project Development Co Ltd v KMK Securities* [1982] 1 WLR 1470, 1472; *Guinness Peat Aviation v*

implications for the scope of *Chabra* injunctions. We will examine whether the current scope of *Chabra* injunctions is consistent with each of the four principles.

3. An overview of the requirements for a *Chabra* injunction

For a claimant to obtain a pre-judgment *Chabra* injunction against a third party from the English courts, it is necessary to satisfy the following requirements:

(1) The *Chabra* injunction must be ancillary to a substantive claim, or an intended claim, against the cause of action defendant;[15]
(2) The claimant must have a good arguable case on the merits of the substantive claim;[16]
(3) There is good reason to suppose that the assets in the hands of the third party would be amenable to execution of a judgment obtained against the cause of action defendant.[17] For example, the defendant must have a debt or other receivable owing to it by a third party (no cause of action defendant), or a claim, or potential claim, against a third party;[18]
(4) There must be a real risk of dissipation of the assets in the hands of the third party;[19]
(5) It must be just and convenient to make the order in the particular circumstances of the case. In other words, the court has a discretion whether to exercise its power to grant a *Chabra* injunction against a third party.[20] The power to grant a *Chabra* injunction is exceptional and should be exercised with caution.[21]

4. The original scope of the *Chabra* injunction

In *TSB Bank International v Chabra*,[22] a new precedent was set by granting an injunction in respect of assets in possession of a third party which were held for and on behalf of the defendant to the substantive claim (the cause of action defendant or simply 'CAD'). Even at this early stage of the development of the *Chabra* injunction, it is not entirely clear how such a draconian injunction against a third party was consistent with the historical origins of freezing injunctions. The freezing order against the third party was regarded by the court as incidental and ancillary to the substantive claim against the CAD. The factual context was a substantive claim against Mr Chabra (the guarantor and the first defendant) pursuant to a contract of guarantee. Although a freezing injunction was granted against Mr Chabra himself, the court took the view that this was inadequate to protect the claimant. Hence the court, acting of its own motion, ordered that a company, in which Mr Chabra was a director and majority shareholder, be joined to the action as the second defendant,[23] and granted a similar freezing injunction against it. The second defendant was an innocent third party in that the claimant had no cause of action against it. To use the modern terminology, the second defendant was a 'no

Hispania Lineas Aereas SA [1992] 1 Lloyds Rep 190, 195; *Arcelormittal USA LLC v Essar Global Fund Limited* [2020] EWHC 740 (Comm).
[15] *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366.
[16] *TSB Bank International v Chabra* [1992] 1 WLR 231.
[17] *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al* [2013] EWHC 422 (Comm).
[18] *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm).
[19] *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al* [2013] EWHC 422 (Comm).
[20] *Yukong Line Ltd of Korea v Rendsburg Investments Corporation* [2001] 2 Lloyd's Rep 113.
[21] *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704 (Comm).
[22] [1992] 1 WLR 231.
[23] This order was made under what was then the R.S.C. Ord.15 r.6(2)(b)(ii).

cause of action defendant' (commonly referred to simply as the 'NCAD'). The court relied on the following passage from the claimant's solicitors' affidavit:

> "In substance, the assets of the company are the assets of Mr. Chabra and that with 100 per cent control in him or his wife, he can procure the transfer of assets, in particular the proceeds of the hotel site where he wishes by disposition of proceeds themselves thus diminishing the value of his shareholding in the company."[24]

As there was no proprietary claim in the substantive proceedings in *Chabra*, the injunction against the NCAD could not be explained on the basis that the court was protecting the claimant's property rights. Indeed, if there had been a proprietary claim, it is highly likely that the claimant would have applied for a proprietary injunction.[25] The claim was contractual and therefore the only available rationale from earlier cases was the prevention of judgment evasion. Crucially, the assets in the hands of the NCAD (a separate legal entity) were treated as the CAD's assets and there was a real risk that a future judgment in favour of the claimant would remain unsatisfied if the NCAD was not restrained from dissipating those assets.

5. The erosion of the beneficial ownership requirement

Later cases have eroded the requirement to show that the CAD has beneficial ownership of assets in the hands of the NCAD.[26] In *Dadourian Group International Inc. v Azury Ltd*,[27] Deputy High Court Judge Bartley-Jones QC concluded that:

> "even if the relevant defendant of the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the Chabra-type jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to the assets. The important issue, to my mind, is substantive control"[28]

The decision in *Yukos v Rosneft*[29] is a good illustration of the extent to which the courts have departed from the original position in *Chabra*. In *Yukos v Rosneft* there was a complex scheme whereby Rosneft's several sister companies had entered into back-to-back oil sale and purchase transactions. The claimant's allegation was that the reason behind such a transactional structure was to permit oil trading with Western purchasers without exposing Rosneft's assets to its Russian creditors. The claimant had obtained arbitration awards against Rosneft in Russia and sought a freezing order against Rosneft's sister companies against whom there was no cause of action. The complicating factor was that, on the evidence, there was a legitimate reason for the adopted structure of oil sale and purchase

[24] *TSB Bank International v Chabra* [1992] 1 WLR 231, 237.
[25] A proprietary injunction can be obtained pursuant to the Civil Procedure Rules, rule 25(1)(c). For examples of freezing injunction cases involving alternative applications for proprietary injunctions, see *Cherney v Neuman* [2009] EWHC 1743 (Civ); *Fundo Soberano de Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm).
[26] *C. Inc v L* [2001] 2 Lloyd's Rep 459; *Dadourian Group International Inc. v Azury Ltd* [2005] EWHC 1768 (Ch); *HM Revenue & Customs v Egleton* [2006] EWHC 2313 (Ch); *Yukos Capital S.a.r.l. v OJSC Rosneft Oil Company* [2010] EWHC 784 (Comm). For a detailed analysis of the key developments see *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm).
[27] [2005] EWHC 1768 (Ch).
[28] [2005] EWHC 1768 (Ch), [30].
[29] [2010] EWHC 784 (Comm). For commentary on this case see McGrath P., 'The Freezing Order: a Constantly Evolving Jurisdiction' (2012) CJQ 12.

transactions. It was for the protection of banks because it ensured that the proceeds of sale made by Rosneft's sister companies (NCADs) only came to under Rosneft's control, and ceased to be controllable by banks, when the companies transferred them to Rosneft's Russian bank accounts. The only circumstances in which such transfers were permitted were in the event of default in the overall credit facilities. The Commercial Court held that it was sufficient if the claimant could show that there existed some legal mechanism to compel the third party to make the assets available for enforcement purposes.[30]

It is submitted that the decision in *Yukos v Rosneft* represented an unprincipled extension of the original scope of the legal power to grant freezing injunctions against third parties. The *Chabra* injunction should not have been granted because of the absence of wrongful conduct in respect of the structure of the assets. The lack of an unjust element means that the decision was inconsistent with a key equitable principle which has underpinned the historical development of freezing injunctions. The claimant was unable to demonstrate that the transactional arrangements had been made in order to ensure Rosneft was judgment-proof. However, some practitioners have applauded the extension of the substantive scope of *Chabra* injunctions in *Yukos v Rosneft*. For example, McGrath QC, who represented the claimant, has argued that the decision:

> "represents a sensible and pragmatic extension of the *Chabra*-jurisdiction, recognising the fact that the monies sitting in the London bank accounts, although in the name of a [respondent] company, and not formally in Rosneft's beneficial ownership, were monies that were subject to irrevocable instructions to pay over to Rosneft and therefore were subject to being preserved under the freezing order jurisdiction. The fact that the whole arrangement appears to have been set up and devised by the banks for their own protection and not by Rosneft as an artificial means of disguising its ownership of these assets simply deprived Yukos of making any submissions based upon sham arrangements. It did not prevent Yukos contending that, taking the scheme at its face value, there was a sufficient connection between Rosneft and the sale proceeds in the English bank account to justify granting the freezing order."[31]

With respect, it is not entirely clear how the connection between Rosneft and the sale proceeds could provide a sufficient justification for a granting a *Chabra* injunction. It is submitted that the court took a claimant-friendly approach and ignored an important distinction. Protecting the claimant from deliberate judgment evasion is materially different from protecting the claimant's ability to enforce a judgment in circumstances where the claimant had made a bad bargain and failed to protect itself from the inherent risk of non-enforcement. The latter type of risk of non-enforcement can arise through defendant's legitimate use of available legal devices. It should always be the responsibility of a claimant company (or more accurately its experienced team of commercial lawyers), rather than the Commercial Court acting retrospectively, to foresee such risk and protect itself from financially damaging business practices.

[30] This represented a wide interpretation of the High Court of Australia's reasoning in *Paul Cardille v LED Building Proprietary Ltd* [1999] HCA 18.

[31] McGrath P., 'The Freezing Order: a Constantly Evolving Jurisdiction' (2012) CJQ 12, 19.

6. Concerns about potential unfairness

A useful case illustrating the difficulties that defendants may face in discharging a *Chabra* injunction is *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al*.[32] In arbitration proceedings the claimant Ukrainian bank sought damages for breach of contractual obligations to repay some loans against Mr Maksimov, its former president. The defendant was the subject of criminal proceedings in Ukraine. The bank sought a freezing order which would cover the assets of a number of English companies which were allegedly the defendant's nominees and over which the defendant allegedly exercised substantial control. The only substantial asset of the English companies was their shareholding in OPH, a Ukrainian company whose beneficial ownership was in dispute. The crucial factual issue was whether a Cypriot company called Carlsbad, the majority shareholder in OPH, was a nominee of Mr Maksimov. In other words, the question was whether Mr Maksimov was the ultimate beneficial owner of Carlsbad, using the director of Carlsbad as his nominee and acting through him in exercising control?[33] Despite the need to resolve such complex and bitterly disputed factual issues, the *ex parte* application for a *Chabra* injunction was successful. Popplewell J, as he then was, rejected the defendants' application to set aside the *ex parte* order and he took the opportunity to summarise the key principles and preconditions governing the power of the English courts to grant *Chabra* injunctions. The most important one is the precondition relating to the link between the CAD and the NCAD:

> "The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD)."[34]

Popplewell J clarified the relevance of substantial control by the CAD over the assets in the name of the NCAD:

> "Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the *Chabra* jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but

[32] [2013] EWHC 422 (Comm).
[33] [2013] EWHC 422 (Comm), [10]
[34] [2013] EWHC 422 (Comm), [7] per Popplewell J (as he then was), emphasis in the original. Popplewell J summary of the principles was cited with approval by the Court of Appeal in *Lakatamia Shipping v Nobu Su* [2014] EWCA Civ 636, [32].

> the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD."[35]

In the light of this principle, it is interesting that, later in the same judgment, Popplewell J decided that the circumstances of the case were such that it was "legitimate to conflate the legally distinct tests of beneficial ownership and substantial control" and concluded that "If Carlsbad, a Cypriot company with admittedly nominee shareholders, is under the substantial control of Mr Maksimov, there is good reason to suppose that he is its ultimate beneficial owner".[36] The specific circumstances he had in mind was that Mr Maksimov had conducted his affairs through a number of offshore companies used as nominees without treating their separate corporate personality as a matter of any reality or significance. It is submitted that the conflation of the concepts of beneficial ownership and substantial control, although limited by Popplewell J to the particular circumstances of the case before him, unnecessarily stretched the *Chabra* jurisdiction into dangerous territory. This is because his liberal approach to an important precondition has increased the *Chabra* injunction's pre-existing potential as a powerful tool for oppression of innocent third parties. The extension in *Maksimov* facilitated the availability of *Chabra* relief for unmeritorious purposes such as putting pressure to obtain security or a settlement on terms unfavourable to the defendant.

Carlsbad's own application to discharge the worldwide freezing order came before Blair J.[37] Carlsbad's main argument was that its assets were not owned by Mr Maksimov. Blair J accepted the claimant's argument that Carlsbad was barred under privity of interest and/or the abuse of process principles running the same point again: Carlsbad was not a party to the proceedings before Popplewell J but it had provided funding for the legal costs of the English companies (the NCADs). Nevertheless, Blair J considered the evidence and concluded that he would not have discharged the order on the strength of the new evidence if the point had been open to Carlsbad to argue. Blair J's judgment provides a short but useful insight into the difficulties that an innocent third party encountered in its attempt to argue that the claimant bank did not meet the requirement that the there was a "good reason to suppose"[38] that its assets were "amenable to enforcement".[39] Carlsbad argued that even if the claimant could prove that the company was owned and controlled by Mr Maksimov, enforcement would not be available in Cyprus. Expert evidence from a Cypriot lawyer was that in the absence of a floating charge, the receiver could not be appointed over the shares. However, for Blair J, this was not sufficient to undermine the claimants' case because the expert witness did not deal with the possibility of the appointment of a trustee in bankruptcy. Given the constraints of the interlocutory stage, the court was not prepared to express a view on whether the appointment of a trustee in bankruptcy would apply to a corporation rather than an individual. It is submitted that what emerges from this analysis of the enforcement issue (which it should be emphasised is the indispensable element in establishing the existence of the power to grant a *Chabra* injunction) is that the limits of the interlocutory process favour claimants. For claimants, it appears from *Maksimov* that allegations

[35] [2013] EWHC 422 (Comm), [7].
[36] [2013] EWHC 422 (Comm), [12].
[37] [2013] EWHC 3203 (Comm).
[38] The good reason to suppose test is equivalent to the well-known good arguable case test: *Lakatamia Shipping v Nobu Su* [2014] EWCA Civ 636, [32].
[39] Ibid, [84] – [87].

about the 'possible routes' of enforcement, backed up by expert evidence, are sufficient to overcome the hurdle of showing that there are assets amenable to enforcement. At the same time, it appears that NCADs may well have a mountain to climb in order to rebut the evidence of the claimant's experts.

The recent developments relating to the good arguable case test only serve to reinforce the difficulties facing NCADs. In *Kaefer v AMS*,[40] the Court of Appeal confirmed that the good arguable case test consists of the following three limbs:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."[41]

Although this three limb test was developed in the context of service out of the jurisdiction, the Court of Appeal in *Lakatamia Shipping v Morimoto*[42] relied upon *Kaefer v AMS* in the context of freezing injunctions.[43] It is clear from the third limb of the test that, just like Blair J in *Maksimov*, the English courts have adopted a pro-claimant solution to the problem of contested issues at the interlocutory stage. One of the policy reasons behind this solution is the desire to prevent "mini-trials" at the interlocutory stage. Indeed, the courts have frequently criticised the tendency of the parties to put forward an overwhelming amount of evidence at the interlocutory stage, thereby delaying access to justice for all litigants.[44] Although there is no doubt that the policy of preventing "mini-trials" is sensible, it is submitted that defendants (whether CAD or NCAD) will find themselves unable to contest many applications for freezing injunctions in relation to the strength of the claimant's case on the merits. When analysed on its own, the relaxation of the good arguable case test may not appear to be a significant difference for claimants. However, it does make a significant difference, especially when one looks at the whole 'package' of changes to the manner in which the English courts apply the substantive preconditions for obtaining any freezing injunction. Apart from the claimant's requirement to establish a good arguable case on the merits, it has always been an essential requirement to demonstrate a real risk of dissipation of the assets. Only a few months after the decision in *Kaefer*, the Court of Appeal in *Lakatamia Shipping v Morimoto*[45] arguably made it easier

[40] [2019] EWCA Civ 10.

[41] Emphasis added. The three limb test was developed by the Court of Appeal in the context of service out of the jurisdiction in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, [7] and unanimously approved by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34. These developments indirectly affect the interpretation and application of the good arguable case test in the context of applications pre-judgment freezing injunctions.

[42] [2019] EWCA Civ 2203.

[43] [2019] EWCA Civ 2203, [38]. See also the emphasis on the "plausible evidential basis" element of the test in the recent judgment in *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] EWHC 980 (Comm).

[44] See, for example, the judgment of Lord Neuberger in *VTB Capital v Nutritek* [2013] UKSC 5.

[45] [2019] EWCA Civ 2203.

for claimants to satisfy the real risk of dissipation requirement.[46] That case was the latest episode in the long running litigation saga relating to a breach of freight forwarding agreement between the claimant, Mr Su, and various companies owned by Mr Su. The claimant obtained two judgments against Mr Su and made an application for a freezing injunction against his mother, Madam Su. The Court of Appeal reinstated a worldwide freezing injunction against Madam Su which had been discharged at first instance on the basis that there was no real risk of dissipation. In contrast to the first instance judge,[47] Haddon-Cave LJ took a more liberal approach to the threshold for a real risk of dissipation. His Lordship provided the following guidance:

> "(1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation.
>
> (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."[48]

It is submitted that, even though the Court of Appeal was cautious to point out that the factual circumstances in *Morimoto* were rare, the above guidance has the potential to undermine the position of defendants in all freezing injunction cases. The real danger is that the court's approach will add further strength to a selection of existing authorities where the courts have come close to conflating two distinct requirements (a good arguable case on the merits and a real risk of dissipation).[49] Conflating the two requirements would be wrong as a matter of principle because they serve two separate functions.[50] Moreover, such an approach would be inconsistent with the need to achieve a level-playing field in litigation as it would effectively allow claimants to circumvent one of the main evidential hurdles for obtaining the relief.[51] The temptation to conflate the two requirements may be particularly strong in cases involving allegations of dishonesty. Consequently, in *Fundo Soberano*,[52] Popplewell J's summary of the key principles relating to the risk of dissipation included a reminder that:

> "It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may] be dissipated. It is also necessary to take account of whether they appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty."[53]

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[46] The fact that this is a possible interpretation of the Court of Appeal's approach is reinforced by one practitioner's commentary on the case: J. Russell QC, 'Freezing Injunctions: Recent Guidance from the Court of Appeal', Quadrant Chambers, 16th December 2019, <https://www.quadrantchambers.com/news/freezing-injunctions-recent-guidance-court-appeal-john-russell-qc>, accessed on 10th May 2020.
[47] For the judgment of Sir Michael Burton, see *Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145 (Ch).
[48] [2019] EWCA Civ 2203, [51].
[49] See, for example, *Ahadi v Ahadi* [2015] EWHC 3912 (Ch).
[50] F. Saranovic 'Rethinking the Scope of Freezing Injunctions' (2018) CJQ 383, 392.
[51] Ibid.
[52] *Fundo Soberano de Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm).
[53] *Fundo Soberano de Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm), [

This statement has been approved by the Court of Appeal in *Lakatamia v Morimoto*[54] and should serve as a useful reminder for first instance judges to treat the requirement of a real risk of dissipation as separate from the assessment of the strength of the claimant's case on the merits.

The pro-claimant attitude of the courts in relation to the pre-conditions for obtaining a *Chabra* injunction is counterbalanced by the highly onerous duty of full and frank disclosure for any *ex parte* application. The existence of this duty is necessary because *ex parte* applications for freezing injunctions represent an exceptional derogation from the principle of hearing both sides. There is no doubt that it represents an important safeguard for defendants regardless of the fact that there is no automatic right to discharge the injunction for non-compliance with the duty. The court has a discretion whether or not to discharge the injunction in cases of failure to discharge the duty, including in cases involving innocent non-disclosure.[55] One of the implications of this duty is that the claimant is obliged to provide a fair presentation of the case, including the evidence as to the real risk of dissipation of the assets. The duty of full and frank disclosure was considered in detail in the recent case, *Les Ambassadeurs v Albluewi,*[56] where the defendant, a high net-worth individual from Saudi Arabia, acted in an evasive manner and failed to keep a number of promises to pay his gambling debts to the claimant casino. The defendant was successful in his argument that the claimant was in breach of the duty of full and frank disclosure at the *ex parte* stage. The Commercial Court emphasised that the non-disclosure was "particularly material because it went to the issue of whether a real risk of dissipation was made out".[57] The claimant's non-disclosure had misled the judge about the risk of dissipation: the judge hearing the *ex parte* application had not considered the impact of the defendant's defaults and the complexity and value of his assets. The onerous nature of the duty of full and frank disclosure was further illustrated by the judgment of Popplewell J in *Fundo Soberano* where an *ex parte* freezing injunction covering the defendant's worldwide assets totalling US$ 3 billion was discharged on the basis of material non-disclosure. Popplewell J explained that there is a "heavy" burden on the legal team to ensure that the lay client is fully aware of the duty of full and frank disclosure.[58] The judge expressly acknowledged that compliance with the duty will be a difficult task in factually complex cases (such as allegations of international fraud). The important lesson from *Fundo Soberano* is that it will not be enough for the legal team to expressly point out in the *ex parte* application that they are purporting to fulfil the duty of full and frank disclosure. Instead, it is necessary for the legal team to take active steps in dealings with their clients and "to exercise a degree of supervision in ensuring that the duty is discharged".[59]

7. Consistency with the key principles

Having reviewed some of the key authorities, let us go back to the four key principles underpinning the power to grant freezing injunctions. Is there a convincing argument that *Chabra* injunctions are necessary to prevent injustice? There is no straightforward answer to this question. *Chabra* injunctions

[54] *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203.
[55] *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350; *Memory Corporation v Sidhu (No 2)* [2000] 1 WLR 1443; *Banca Turco Romana v Cortuk* [2018] EWHC 662 (Comm).
[56] *Les Ambassadeurs Club Limited v Albluewi* [2020] EWHC 1313 (QB).
[57] [2020] EWHC 1313 (QB), [93].
[58] *Fundo Soberano de Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm), [53].
[59] Ibid.

have been described by the Court of Appeal as "ancillary to the main freezing injunction" in that they ensure the effectiveness of the main injunction.[60] This description of their function suggests that the main freezing injunction against the CAD may not be sufficient to prevent injustice. However, we must not lose sight of the fact that there are a number of methods at the disposal of the claimant (other than a *Chabra* injunction) for ensuring the effectiveness of the main injunction against the defendant. It is submitted that, before a decision is made to grant a *Chabra* injunction, the court should be satisfied that none of the less intrusive, alternative methods is sufficient to ensure unobstructed operation of the main injunction. For example, when a freezing injunction is granted against a CAD, any third parties holding the assets can be notified of the court order. If a third party is notified of the order, any non-compliance with the terms of the order by the third party may amount to a contempt of court.[61] Merely notifying a third party would normally be effective to ensure the effectiveness of the main injunction if that third party is an independent natural or legal person, such as a bank holding the defendant's assets. However, mere notification is less likely to be effective where the defendant has substantial control over the actions of the third party, such as the factual scenario in *Chabra* itself. This discussion reveals that a *Chabra* injunction can be justified as a necessary tool to prevent injustice *only* in the circumstances where a less intrusive method would be ineffective to prevent dissipation of the assets.

Turning to the related principle of equipage equality, a key question is whether a *Chabra* injunction promotes a level-playing field in litigation or arbitration. There is no doubt that a *Chabra* injunction can address the unequal position of the parties where there are realistic opportunities for the defendant to take advantage of any gaps in the protection offered by the main injunction. Indeed, *Chabra* injunctions can be a very useful weapon for claimants dealing with an unscrupulous defendant operating as part of an elaborate corporate structure where assets can be easily moved within the group without a legitimate justification. At the same time, we must also recognise that a *Chabra* injunction has the potential to distort a fair distribution of freedom between the parties at the interlocutory stage. In order to reduce the potential for an unfair balance of rights, it is crucial for any *Chabra* injunction to be subject to the usual safeguards, such as the ordinary and proper course of business exception. Without the necessary safeguards for defendants, a *Chabra* injunction has the potential to be exploited by unscrupulous claimants. There is evidence from recent case law that the lack of some safeguards for defendants in freezing injunctions is becoming more acceptable.[62] The courts' approval of the absence of safeguards in these cases should be regarded as strictly confined to post-judgment freezing injunctions where there are justifiable reasons for exercising a lesser degree of caution.

Is the *Chabra* injunction consistent with the principle that freezing injunctions are not designed to provide security for the substantive claim? All freezing injunctions, including *Chabra* injunctions, are problematic when it comes to compliance with this basic principle. This provides a powerful reason for proceeding with more caution when judges exercise their discretion in assessing whether it is 'just and convenient'[63] to grant a *Chabra* injunction. A successful *ex parte* application for a pre-judgment

[60] *JSC MP Bank v Pugachev et al* [2015] EWCA Civ 906.
[61] This is usually made clear in bold letters in the penal notice on the front page of the court's order – see the standard form freezing injunction in the Annex of CPR Practice Direction 25A.
[62] *Michael Wilson & Partners Ltd v John Forster Emmott* [2019] EWCA Civ 219; *New York Laser Clinic Ltd v Naturastudios Ltd* [2019] 11 WLUK 215.
[63] Section 37(1) of the Senior Courts Act 1981.

freezing injunction can be a significant tactical advantage for the claimant to such an extent that a CAD is forced to provide security.[64] Obtaining a *Chabra* injunction in addition to the main freezing injunction increases the existing tactical advantage of the claimant. It can put additional financial pressure on the defendant and exacerbate the "reputational stigma"[65] as the impact of the English court's orders would be felt by a wider range of parties doing business with the defendant.

Are *Chabra* injunctions consistent with the principle that freezing injunctions should adequately protect third parties from any unacceptable interference with their rights? It is clear from the outset that the very existence of *Chabra* injunctions may be inconsistent with this principle. However, given their equitable roots, freezing injunctions are characterised by the flexibility of their substantive scope and the ability of the courts to set their boundaries according to the demands of justice. Indeed, the Court of Appeal has treated their flexibility as a matter of principle:

> "The second principle is that the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders"[66]

On the face of the matter, it seems that it is necessary to restrain dealings even with the assets in the hands of third parties in order to avoid an easy avenue for defendants to become judgment-proof. However, the need for greater caution when exercising the legal power to grant a *Chabra* injunction was underlined by Males J (as he then was) in *Cruz City 1 Mauritius Holdings v Unitech*:

> "[The *Chabra* injunction] is, nevertheless, an unusual jurisdiction, involving as it does the exercise of the court's compulsive powers, backed by the sanction of contempt proceedings, against a party against whom no cause of action is asserted. In a case where the exercise of the jurisdiction is not based on beneficial ownership but on the possibility of the judgment creditor being able to exercise rights of the judgment debtor, its effect is to restrain a *Chabra* defendant from dealing with assets over which it has both legal and beneficial ownership."[67]

By analogy with applications for a pre-judgment freezing injunction against a CAD, the key task of the court in *Chabra*-type cases should be to identify the unjust element in the NCAD's conduct. It is difficult to accept the argument that the unjust element in *Chabra*-type cases is the very manner in which the assets are held and the resulting inability of the claimant to enforce their future judgment against the CAD. In *The Mahakam*, Gloster J emphasised that "the court should be cautious about making an order which extends to the property of persons who are not substantive defendants and cannot be shown

[64] This was explicitly acknowledged by the Court of Appeal in *Energy Venture Partners v Malabu* [2015] 1 W.L.R. 2309, [52].
[65] The term was used by Gloster LJ in *Candy v Holyoake* [2017] EWCA Civ 92, [36].
[66] [2013] EWCA Civ 928, [36] per Beatson LJ. In articulating this principle, I would interpret the Court of Appeal's use of the term 'jurisdiction' as a reference to the substantive scope of freezing injunctions; the court was not referring to the private international law aspects of freezing injunctions.
[67] [2014] EWHC 3704 (Comm), [10]. On the need for caution see also *ETI Euro Telecom International NV v Bolivia* [2008] EWCA Civ 880, [126].

to have frustrated the administration of justice".[68] Nevertheless, she did not go as far as suggesting that the courts should refrain from granting *Chabra* injunctions in the absence of wrongdoing. It is submitted that, in order to provide adequate protection for third parties, a prerequisite for a *Chabra* injunction ought to be some credible evidence of wrongful conduct on the NCAD's part. Although the courts would be justifiably reluctant to provide a rigid definition of wrongful conduct or a non-exhaustive list of examples, some guidance would be helpful. Evidence of wrongful conduct could be the existence of an 'illegitimate' transaction in respect of assets sought to be frozen. 'Illegitimate' could be defined as a transaction which is not in the ordinary and proper course of business and whose purpose is to knowingly put the assets beyond the claimant's reach. This means that *Chabra*-type injunctions would be restricted to deliberate acts of evasion. Put differently, under this proposal, *Chabra* injunctions would not be readily available as a form of assistance to claimants whenever there are potential difficulties with enforcement. In the absence of wrongful conduct on the NCAD's part, it might be sufficient to injunct the CAD from collecting the proceeds of the receivable from the NCAD otherwise than by instructing the NCAD to pay it into a designated account.[69] The factual scenario in *Linsen International v Humpuss*[70] was an excellent example where there was clear evidence of wrongful conduct within a group of shipping companies with the aim of evading enforcement. There was evidence of illegitimate transfers of assets for the sole purpose of avoiding liability. Flaux J (as he then was) described the effect of the suspicious transactions in the following terms:

> "the Singaporean company has been 'cleaned out' of assets worth some US$60 million which have been transferred to an Indonesian company which was balance sheet insolvent and which would appear not to have paid any part of the consideration for the ostensible transfers."[71]

But for the absence of personal jurisdiction as a matter of private international law,[72] the *Chabra* injunction would have been granted against the Indonesian company. There was a good arguable case that the purported sales of vessels and transfers of assets to the Indonesian company were shams designed to make enforcement more difficult and that the corporate structure was misused.[73] Given that the transfers could be unravelled, the claimant could successfully show that the Indonesian company (the NCAD) had or held assets which were arguably the CAD's assets or in which the latter had a beneficial interest.

The proposal to restrict *Chabra* injunctions to cases involving solid evidence of deliberate evasion is consistent with one of the early authorities where Sir Thomas Bingham MR stated:

> "if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would…be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked

[68] *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm), [39]. See also *Lakatamia Shipping v Nobu Su* [2014] EWCA Civ 636, [32] and *Phoenix Group Foundation v Cochrane & Others* [2017] EWHC 418 (Comm), [17].
[69] *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm), [56].
[70] *Linsen International Limited v Humpuss Sea Transport Pte Limited* [2011] EWHC 2339 (Comm).
[71] [2011] EWHC 2339 (Comm), [80].
[72] For analysis of legal issues relating to jurisdiction in *Chabra* injunction cases, see below, the section of this article entitled "The International Scope of *Chabra* Injunctions".
[73] [2011] EWHC 2339 (Comm), [83].

power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties".[74]

Furthermore, the proposal would have reduced the availability of *Chabra* injunctions in cases involving an insolvent company that was operating in a corporate group. As the law currently stands, *Chabra*-type injunctions may be an attractive form of relief in circumstances where the CAD has become insolvent. It is submitted that the English courts should not use freezing injunctions to assist claimants to overcome the difficulties caused by the insolvency of the CAD. The risk that a claimant would not be able to recover the judgment debt because the defendant will take deliberate steps to dissipate his assets is materially different to the risk of being unable to recover because the defendant company may become insolvent. The former type of risk is based on the possibility of intentional and wrongful actions of the defendant. The latter type of risk does not necessarily depend on the wrongful actions of the defendant and the conduct of the defendant should be carefully scrutinised. Claimants should not be able to obtain freezing injunctions against innocent third parties to deal with the general risk of insolvency where there is nothing unjust about the actions of the defendant.

8. The International scope of *Chabra* injunctions

This section will provide critical analysis of the potential problems relating to the application of private international law rules and, more specifically, the rules on the jurisdiction of the English courts. Applications for *Chabra* injunctions give rise to additional concerns where the English courts are being asked to exercise extraterritorial jurisdiction. Several categories of cases can be identified, each with a different degree of complexity depending on the strength of connection to England.

Presence in the jurisdiction, foreign assets, and English proceedings

The first category consists of cases where the NCAD is present within the territorial jurisdiction but at least some of the NCAD's assets are located outside the jurisdiction. This is not a controversial category as there is a strong connection to England. The presence of the NCAD in England means that the English court would have personal jurisdiction over the NCAD as of right by way of lawful service of the application notice. It would be up to the NCAD to challenge the jurisdiction under Part 11 of the Civil Procedure Rules. It is a starting point in English private international law that personal jurisdiction based on presence includes the power to order a party to do or not to do something abroad.[75] By restraining the NCAD from dealing with their assets located abroad, the English court would not even regard the injunction as extra-territorial because the widely held view is that a freezing injunction operates *in personam* rather than *in rem*.[76] Any non-compliance with the terms of the injunction in relation to the NCAD's foreign assets would be enforceable in England such as by way of proceedings for contempt of court.

English proceedings and service out of the jurisdiction

[74] Per Sir Thomas Bingham MR in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, 377. See also Gloster J's emphasis on "collusion, or impropriety, or some participation on the part of the third party" in judgment evasion: *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm), [56].
[75] *Masri v Consolidated Contractors International Co SAL and Another* [2008] EWCA Civ 625.
[76] *Babanaft International v Bassatne* [1990] Ch 13.

The second category consists of cases where the claimant intends to commence (or has already commenced) court proceedings against the CAD in England and the NCAD is not present in England. In such cases the claimant needs to establish personal jurisdiction over the NCAD by service of the application notice out of the jurisdiction. One of the requirements for obtaining the court's permission for service out is for the claimant to establish, up to the standard of a good arguable case,[77] that one of the grounds of jurisdiction (or 'gateways') is applicable.[78] Given that the claimant would not have a substantive claim against the NCAD, it would be difficult to find an applicable ground of jurisdiction. Possible options include the necessary or proper party gateway and the gateway for claims made to enforce any judgment or award.[79]

With regards to paragraph 3.1(10), the presence of the NCAD's assets in England would provide a powerful argument that a *Chabra* injunction would be in aid of future enforcement proceedings in England.[80] This is consistent with the Court of Appeal's observations in *Linsen International*[81] where Stanley Burton LJ stated that: "The object of [paragraph 3.1(10)] is to enable enforcement of a judgment against assets within this country that belong to a defendant who is out of the jurisdiction."[82] A possible counter-argument in the future could be that paragraph 3.1(10) should not apply to pre-judgment *Chabra* injunctions and should only be used for post-judgment applications.[83] Post-judgment freezing injunctions are more closely related to enforcement proceedings in comparison to pre-judgment injunctions.[84] The courts have always taken a more liberal approach to post-judgment applications. This is illustrated by the Court of Appeal's judgment in *DST v Shell International Petroleum*[85] where Sir John Donaldson MR explained that:

> "The case for imposing an injunction was much stronger than Bingham J thought that it was, because DST was an actual and not a potential judgment creditor. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that DST might at some later date be able to establish its claim--the ordinary *Mareva* situation."[86]

A pre-judgment application for any type of freezing injunction should be treated with a greater degree of caution from the court as the risk of a wrongfully granted injunction cannot be completely eliminated. There is no reason why a cautious approach should not extend to the interpretation of paragraph 3.1(10) given that service out of the jurisdiction represents an exercise of long-arm

[77] *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869.
[78] CPR, rule 6.37.
[79] CPR PD6B, 3.1(3) and 3.1(10) respectively.
[80] Further support for this view can be found in Lord Neuberger MR's comments in *Linsen International v Humpuss*, [2011] EWCA Civ 1042 [25].
[81] [2011] EWCA Civ 1042.
[82] [2011] EWCA Civ 1042, [30].
[83] It should be noted that the *Chabra* injunction granted by Gloster J (as she then was) in *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] EWHC 3143 (Comm) was a post-judgment order as the claimants had already obtained an arbitration award against the CAD.
[84] See Farquharson J's observations in *Orwell Steel (Erection and Fabrication) Ltd. v Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097, 1100.
[85] *Deutsche Schachtbau-Und Tiefbohrgesellschaft m.b.H. v Shell International Petroleum and another* [1987] 2 All ER 769.
[86] [1987] 2 All ER 769, 783.

jurisdiction over a foreign defendant. If we make the assumption that paragraph 3.1(10) does apply to pre-judgment *Chabra* injunctions, the authorities support the view that this provision would only enable the claimant to obtain an order limited to the NCAD's English assets.[87] There is some room for debate whether this territorial limitation on paragraph 3.1(10) is a matter of discretion or the existence of jurisdiction. The better view is that it is an issue relating to the existence of jurisdiction as the English courts should have no discretion to interfere with a foreign third party's foreign assets. Such discretion can be regarded as contrary to the principle of international comity as it would enable the English courts to encroach upon the regulatory authority of sovereign foreign states in circumstances where there is insufficient connection with England. Further support for restricting the territorial scope is found in the courts' interpretation of the 'necessary or proper party gateway'. The judgment of Aikens J in *C Inc plc v L*[88] suggests that service out is possible under paragraph 3.1(3) but that the injunction has to be limited to the NCAD's English assets.

Foreign proceedings and service out of the jurisdiction

The English courts have confirmed that they have a power to grant *Chabra* injunctions in support of foreign substantive proceedings, including against NCADs who are not present in England.[89] In such cases, the foundation for the court's power to grant the injunction is section 25 of the Civil Jurisdiction and Judgments Act 1982. There seem to be no difficulties for the claimant to find a ground of jurisdiction as the English courts have readily accepted the argument that paragraph 3.1(5) of Practice Direction 6B can be used for service out on a NCAD. It is clear from *Linsen International v Humpuss* that the gateways in paragraphs 3.1(3) and 3.1(10) would not be available if the substantive proceedings are not in England.[90]

The application of section 25 of the 1982 Act involves a two stage process.[91] First, the court needs to be satisfied that a *Chabra* injunction would be available if the substantive proceedings had been in England rather than abroad. If it would be available, at the second stage the court will have to determine, as a matter of discretion, whether it would be expedient or inexpedient to grant the injunction. The test of expediency is riddled with uncertainty despite a substantial number of judgments where it was applied, the vast majority of which are not *Chabra* cases but injunctions against CADs.[92] It is useful at this point to make a comparison between *Chabra* and non-*Chabra* freezing injunctions in relation to the manner in which discretion has been exercised under section 25 of the 1982 Act. In applications for *Chabra* injunctions collateral to foreign proceedings, arguably the courts have already taken a more cautious approach. This is evident from *Belletti v Morici*[93] where a worldwide freezing injunction was sought against the parents of the first defendant because of their alleged assistance in hiding the assets. The claimant had no cause of action against the parents. The

[87] *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm).
[88] *C. Inc v L* [2001] 2 Lloyd's Rep 459.
[89] *Belletti v Morici* [2009] EWHC 2316 (Comm); *JSC VTB Bank v Skurikhin* [2012] EWHC 3916.
[90] [2011] EWHC 2339 (Comm), [161].
[91] *Refco v Eastern Trading* [1999] Lloyd's Rep 159; *Motorola v Uzan (No 2)* [2003] EWCA Civ 752.
[92] See, inter alia, *Republic of Haiti v. Duvalier* [1990] 1 QB 202; *Motorola v Uzan (No 2)* [2003] EWCA Civ 752; *Banco Nacional v Empresa* [2007] EWCA Civ 662; *Mobil Cerro Negro v PDV* [2008] EWHC 532 (Comm); *Royal Bank of Scotland v FAL Oil* [2012] EWHC 3628; *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm); *Cruz 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm); *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 1539 (Comm).
[93] *Belletti v Morici* [2009] EWHC 2316 (Comm).

Chabra injunction had been granted *ex parte* by Andrew Smith J but it was set aside by Flaux J (as he then was) whose conclusion was that it was "inexpedient" to grant the order. The reasoning was that the parents were domiciled in Italy and there were no assets under their control which were situated in England:

> "Where the English court had territorial jurisdiction over the parents, it would clearly be appropriate to grant such an ancillary order, but as I see it the appropriateness of the order cannot in itself justify the exercise of extra-territorial jurisdiction, where there would otherwise be no jurisdiction over the parents. Where the relevant defendants have no connection with the jurisdiction and the relevant assets are not located here, it will rarely if ever be appropriate or expedient for the court to assume jurisdiction under section 25 of the 1982 Act."[94]

Even though the *Chabra* injunction was set aside by Flaux J at the return date hearing, the fact that Andrew Smith J granted the injunction means that the law in this area is far from satisfactory. The above passage from Flaux J's judgment underlines the importance of eradicating the tendency to mix up the substantive preconditions for obtaining a *Chabra* injunction (e.g. a good reason to suppose that the assets are amenable to enforcement) with the English court's jurisdiction to grant the order. Although there is no doubt that this is a useful distinction, it is submitted that the English courts need to go further in order to protect third parties and prevent illegitimate interference with the regulatory authority of the foreign courts. The most effective solution would be to introduce a mandatory requirement for the English courts to have jurisdiction over the assets in all cases where a *Chabra* injunction is sought in support of foreign substantive proceedings. Put differently, the proposal is to restrict all *Chabra* injunctions under section 25 of the 1982 Act to English assets and to treat this as a requirement relating to the existence of jurisdiction. Under this proposal, Andrew Smith J in *Belletti v Morici* would have had no choice but to refuse the *Chabra* injunction at the *ex parte* stage as the NCADs (the Italian parents) had no assets in England.

Unsurprisingly, the proposal to restrict the scope of the jurisdiction under section 25 is not entirely consistent with the current practice, as illustrated by *JSC VTB Bank v Skurikhin*.[95] In that case Burton J granted a worldwide order against two NCADs (English companies with foreign assets). The order was made in support of Russian substantive proceedings. Unlike the NCADs, the CAD was not present in England and the court only granted an injunction in respect of his English assets. Burton J's decision to grant a worldwide order in support of foreign proceedings highlights the potential danger of treating the territorial scope of the *Chabra* injunction as a matter of discretion (i.e. exercise of jurisdiction). The case confirms that the English courts will exercise their discretion under section 25 to grant a *Chabra* injunction even in respect of the NCAD's foreign assets as long as the NCAD is present in England. Although at first glance this may seem as an attractive position, the somewhat murky reality is that there are numerous problems of policy and principle with granting worldwide orders collateral to foreign proceedings in any application for a freezing injunction,[96] let alone one

[94] [2009] EWHC 2316 (Comm), [54] per Flaux J.

[95] [2012] EWHC 3916.

[96] For a detailed discussion of the theoretical flaws of granting worldwide freezing injunctions under section 25 of the 1982 Act, see F. Saranovic 'Jurisdiction and Freezing Injunctions: a Reassessment' (2019) 68 ICLQ 639. See also T Hartley, 'Jurisdiction in Conflict of Laws – Disclosure, Third-Party Debt and Freezing Orders' (2010) LQR 19.

where there is no substantive claim against the party sought to be restrained. One of these problems is that it ignores an important exception to the scope of the court's jurisdiction: cases involving foreign substantive proceedings in an EU Member State where Article 35 of the Brussels I Recast Regulation applies.[97] Where a *Chabra* (or any other type) of freezing injunction is sought in support of proceedings in an EU Member State, it necessary for the claimant to establish a "real connecting link" between the subject matter of the order and the territorial jurisdiction of the English court.[98] It is still a matter of debate whether the presence of the CAD and/or the NCAD in England can constitute the real connecting link.[99] The preferable view is that, at least as far as *Chabra* cases are concerned, providing evidence of English assets is the only means to meet the threshold.[100] It follows that the proposal in this article to restrict the territorial scope of *Chabra* injunctions under section 25 of the 1982 Act to English assets would ensure consistency with the approach under the EU regime. The territorial scope would be the same regardless of whether the foreign proceedings are in the courts of an EU Member State. Indirect support for the proposal is the fact that there are already a number of cases where it has been suggested that the real connecting link criterion is applicable outside the scope of the EU regime.[101] Most recently, in *Motorola Solutions*, a case concerning application for various interim relief (including a *Chabra* injunction) in aid of enforcement of an Illinois judgment, Jacobs J observed:

> "It is also clear from the authorities that a cautious approach should be adopted by the court in relation to the grant of relief under s. 25 CJJA 1982 in the case of non-residents with assets abroad […]. One reason for this is the need for a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the court […]. It may well be that the need for this real connecting link explains why Motorola has confined its present application for a freezing order to Hytera China's assets within the jurisdiction."[102]

The problem with some of the earlier cases, such as *RBS v FAL Oil,* is that the interpretation of the real connecting link criterion appears to be considerably wider than the author's view and that of Males J (as he then was) in *Cruz City 1 Mauritius Holdings v Unitech.* The inconsistency of the case law on this issue is undesirable for all stakeholders. It should be resolved by a single definition of a real connecting link with the effect of unifying the territorial scope of *Chabra* injunctions under section 25 for all foreign proceedings.

Arbitration proceedings and service out of the jurisdiction

[97] Reg (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Recast Regulation')
[98] *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95) [1999] QB 1225, [40]; *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2008] 1 WLR 1936; *Belletti v Morici* [2009] EWHC 2316 (Comm).
[99] See Merrett, L. 'Worldwide Freezing Orders in Europe' (2008) LMCLQ 71. *Masri v Consolidated Contractors International (No 2)* [2009] 2 WLR 621, [106],
[100] Support for this view is found in Males J's *obiter* comments in *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704 (Comm), [94]. For a seemingly conflicting statement, see the *obiter dicta* in *Masri v Consolidated Contractors International (No 2)* [2009] 2 WLR 621, [106].
[101] *Royal Bank of Scotland Plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm), [37]; *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm), [27]; *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] EWHC 980 (Comm).
[102] *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] EWHC 980 (Comm), [119].

It is necessary to examine this category of cases because there are potentially insurmountable obstacles to service out of the arbitration claim form which do not exist in the context of court proceedings. One implication for commercial parties is that *Chabra* injunctions may have a more limited availability in any disputes subject to arbitration. Until we have an unequivocal statement from the Court of Appeal, it will remain controversial whether there is a sufficient justification for the rules on service out to vary in their scope depending on the type of proceedings (i.e. arbitration or litigation). Indeed, some claimants have sought to argue that there is a "lacuna" in the rules on service out.[103]

There are inconsistent statements from the English courts on the availability of *Chabra* injunctions in support of arbitration proceedings where the NCAD is outside the jurisdiction. The root of the problem appears to be the scope of the potential gateways for service out of the jurisdiction in CPR 62.5. The uncertainty in this area is exacerbated by further disagreements on the scope of section 44 of the Arbitration Act 1996, including the issue of whether a one-size fits all approach should be applied to the different paragraphs of section 44(2). In *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov,*[104] Blair J took a broad view of the scope of the court's powers stating that:

> "there is no binding authority on this point. I consider, however, that […] in a proper case, there is power to order service out of the jurisdiction under CPR 62.5(1)(b) on a defendant, albeit the defendant is not a party to the arbitration agreement. Clearly this is not a power to be exercised lightly, but there are reasons for thinking that this may be the right analysis."[105]

By contrast, *Cruz City 1 Mauritius Holdings v Unitech*,[106] Males J (as he then was) held that claimants may rely on CPR 62.5(1)(c) only against a party to the arbitration agreement. *Obiter*, the judge also considered that section 44 of the Arbitration Act 1996 and the corresponding gateway in CPR 62.5(1)(b) do not include any power to grant an injunction against a non-party.[107] One of the reasons for his narrow view of the scope of section 44 of the 1996 Act was that it was "unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world".[108] Similarly, in *DTEK Trading v Morozov*,[109] Sara Cockerill QC came to the same conclusion in respect of CPR 62.5(1)(b) in the context of an application by the claimant against a third party for an interim order for preservation and inspection of a settlement agreement. The judge warned about the dangers of camouflaging this important issue as a matter of discretion:

> "[…] it would be an error to derogate from the jurisdictional stage of the argument and place all the emphasis on discretion. The consideration of jurisdictional thresholds in service out places an important check on the jurisdiction of the court which if not exorbitant […] should

[103] *DTEK Trading v Morozov* [2017] EWHC 94 (Comm), [28].
[104] [2013] EWHC 3203.
[105] [2013] EWHC 3203, [80]. Similar views have been expressed in the following cases: *Tedcom Finance v Vetabet Holdings* [2011] EWCA Civ 191; *BNP Paribas v OJSC Russian Machines* [2011] EWHC 308; *Western Bulk Ship Owning v Carbofer Maritime Trading* [2012] EWHC 1224.
[106] [2014] EWHC 3704 (Comm).
[107] [2014] EWHC 3704 (Comm), [47].
[108] [2014] EWHC 3704 (Comm), [49].
[109] [2017] EWHC 94 (Comm).

not lightly be used to intrude on parties who are not within the court's natural territorial jurisdiction."[110]

The issue of whether service out is possible against NCADs was considered in January 2020 by the Commercial Court in *Trans-Oil International SA v Savoy Trading LP*.[111] The underlying arbitration proceedings related to a contract for the sale of wheat by Savoy Trading to the claimant. That contract was signed by Mr Melnykov who had a power of attorney from Savoy Trading. Although Mr Melnykov was neither a party to the contract of sale nor personally liable, the claimant sought a *Chabra* injunction against him in respect of his foreign assets. Moulder J held that, in the light of the judgments in *Cruz City 1* and *DTEK*, it was not possible to grant a *Chabra* injunction against Mr Melnykov as the gateway in CPR 62.5(1)(b) is not available against a non-party. It is significant to note that Mr Melnykov was not present in England and had no assets in the jurisdiction. It is submitted that, regardless of whether the gateway in CPR 62.5(1)(b) can be used to serve out a NCAD, the absence of any connection with England should be fatal to any application for a *Chabra* injunction. In order to ensure the English courts do not illegitimately encroach upon the regulatory authority of foreign states, there should be no possibility for obtaining a *Chabra* injunction against a foreign NCAD in respect of their foreign assets. By way of analogy with Sara Cockerill QC's warning in *DTEK*, it is not enough to control such encroachment by a cautious exercise of discretion. Apart from protecting the interests of foreign states, a clear rule delimiting the existence of jurisdiction would protect NCADs from the dangers of multiple applications for *Chabra* relief in different jurisdictions.[112]

Most recently, the Court of Appeal in *A v C*,[113] in the context of an application in aid of foreign arbitration proceedings, held that under section 44(2)(a) of the 1996 Act it is permissible to make an order for the taking of evidence by way of deposition from a non-party witness. The Court of Appeal explained that this was the correct position regardless of the scope of the other heads of the subsection and whether or not they also apply in relation to non-parties. The court distinguished both *Cruz City 1* and *DTEK* because the narrow views were concerned with section 44(2)(e) and section 44(2)(b) respectively. Males LJ commented that there was no reason to doubt the correctness of the decisions in *Cruz City 1* and *DTEK* but reserved his opinion on the issue.[114] It is submitted that, when assessing the scope of the different heads of section 44(2), the courts should take into consideration the fact that the degree of invasion of the rights of a non-party differs depending on the type of the measure sought. Given the analysis in this article of the various extensions to its substantive scope, there is no doubt that a *Chabra* injunction is one of the most invasive types of relief that a claimant can apply for under section 44. Indeed, as the litigation in *Cruz City 1* illustrates, a claimant applying for a *Chabra* injunction may choose to 'throw the kitchen sink' by also applying for disclosure and receivership orders. From this perspective, in addition to the convincing and detailed reasons given by Males J in *Cruz City 1*, the appellate courts should not hesitate to confirm that section 44(2)(e) does not include the power to grant orders against non-parties.

[110] [2017] EWHC 94 (Comm), [55].
[111] [2020] EWHC 57 (Comm).
[112] For a recent example of *Chabra* injunctions and ancillary interim relief in multiple jurisdictions, see *China Metal Recycling (Holdings) Limited v Chun Chi Wai* [2020] EWHC 318 (Ch).
[113] [2020] EWCA Civ 409.
[114] [2020] EWCA Civ 409, [57].

9. Conclusions

A freezing injunction is more difficult to justify in relation to any assets in the hands of third parties against whom there is no cause of action. Although there was something unusual about restraining third parties right from the outset, there is no doubt that the power of the courts to grant a *Chabra* injunction was originally developed for well-intentioned reasons: to keep up with the new methods of hiding assets. However, its ever increasing scope has turned the *Chabra* injunction into a dangerous weapon in the hands of an unscrupulous claimant. The recent tendency of the courts to take a liberal approach to the preconditions for all freezing injunctions (such as the evidential threshold relating to the defendant's conduct) has resulted in a departure from the key principles underpinning the *Chabra* injunction. As we have become so used to *Chabra* injunctions, it is worth recalling that one of these principles is the need to assess the balance of prejudice and protect third parties from unacceptable interference with their rights. A mere promise to take this principle into consideration when determining whether it is just and convenient to grant the order is not enough. The courts should reassess the guidance from the key authorities and increase the protection for third parties, such as by placing emphasis on identifying deliberate evasion. Insufficient protection of third parties is not limited to domestic cases: the courts should also take steps to restrict the availability of *Chabra* injunctions in cross-border litigation and arbitration. The restrictions at the international level will have the added benefit of preventing illegitimate interference with the jurisdiction of the foreign courts. Given the potential for further expansion of the boundaries of *Chabra* injunctions, it is clear that the time has come for a more cautious approach.